

United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C.

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Date: 12/01/97

Case No: 96 INA 166

In the Matter of:

MARY ANN MOORE,
Employer,

On Behalf of:

MARIA A. TORRES,
Alien

Appearance: M. E. Orr, Esq., San Juan Capistrano, California

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of MARIA A. TORRES (Alien) by MARY ANN MOORE (Employer) under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, denied the application, Employer requested review pursuant to 20 CFR § 656.26.¹

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the Employer's responsibility to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On July 12, 1994, the Employer applied for certification to permit her to employ the Alien on a permanent basis as a "Cook Domestic Service (Live Out)" to perform the following duties in her household:

The occupant of this position will be required to cook, season and prepare a variety of meat, fish, chicken, rice dishes, soups, salads according to my instructions. Will plan menus and order foodstuffs. Will serve meals and then after the meals are over will clean up the kitchen and cooking utensils, pots, pans, etc. Will serve and cook for both lunch and dinner for 3 family members and various [sic] guets. Will be required to determine how many will be at each meal in order to properly plan the menu. Will not be required to perform any housekeeper duties.

AF 20. The work week was forty-five hours from 9:00 AM to 7:00 PM, at the rate of \$11.58 per hour, with time and a half for overtime. The position was classified as "Cook (Domestic Service) under DOT Code No. 305.281-010.² The application (ETA 750A) indicated no education requirements, but required that applicants have two years of experience in the Job Offered. AF 12.³

²DOT No. 305.281-010 Cook (Domestic ser.)Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peals, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.).

³The Alien's application represented that she worked from January 1992 to June 1994 (the date of application), as a "Cook, Domestic Service" in a private home in Aliso, Viejo, California. The duties were essentially the same as those described in Employer's application. AF 55

After the job was advertised, one U. S. worker, Joy Lord, applied for the position. On January 23, 1995, the Employer represented to the State Employment Development Department that she had received no referrals as a result of the mandatory advertising or through prior attempts. AF 31. She later said on March 2, 1995, that she had received one resume in this process. She rejected that applicant, even though the resume of Ms. Lord, showed fifteen years of experience in household management that included a number of the job duties explicitly mentioned in the application. Although the record contains no evidence of a job interview, the Employer concluded that this U. S. worker was not qualified because she claimed only one year as a domestic cook. The resume does not appear to support an such inference, however. AF 29-31, 41-42.

Notice of Findings. On July 17, 1995, a Notice of Findings (NOF) by the CO advised that certification would be denied unless the Employer corrected the defects noted. The CO cited 20 CFR § 656.3 and said the Employer's application failed to establish that the position at issue was permanent full time employment within the meaning of the regulations after considering the application and the evidence of record. The CO observed that the DOT definition of the occupation of Cook, Domestic Services, requires one to two years of education, training, or experience or a combination of such factors for full proficiency. This was based on the DOT Specific Vocational Preparation ("SPV") rating of 6 for this position.⁴

Explaining the credibility problems associated with applications for domestic occupations after the effective date of the 1990 Amendments to the Act in 1991, the CO concluded that the Employer must sustain the burden of proving that the position described in her application does in fact exist and that the position, as performed in Employer's household, clearly constitutes full time employment. AF 11-12. The CO then stated in detail the evidence necessary for the Employer to prove that the job offered is a full time position in the form of several requests for specific facts, including responses to explicit questions, all of which were designed to draw out information addressing this issue. AF 10-11.⁵

⁴This level requires "Over 1 year and up to and including 2 years" of Specific Vocational Preparation.

⁵The CO cited **Ramsinh K. Asher**, 93 INA 347 (Nov. 8, 1994) as to the Employer's burden of proving that a position is permanent and full time (**Gerata Systems America, Inc.**, 88 INA 344 (Dec. 16, 1988)), and the Employer's obligation to provide the specific information the CO reasonably requests to aid in determining whether a position is permanent and full time (**Collectors International, Ltd**, 89 INA 133 (Dec. 14, 1989)).

Rebuttal. On August 9, 1995, an employee in the office of the Employer's attorney filed Employer's a rebuttal in which she argued that the inquiry as to whether or not the position of domestic cook is a full time position is "not a proper inquiry," contending that, "The job opportunity in this case represents the actual minimum requirements for the job opportunity and whether they can be done in 40, or 45 hours is not material, so long as the employer was in compliance by making the same terms available to U. S. workers." AF 06. The rebuttal closed with the following reference to the decision of a panel in 1986 before the effective date of the 1990 Amendments, "In the light of the above, labor certification should immediately be granted in this case and the Certifying Officer be made aware of what happened to him in 1986 is once again happening and he should be held accountable." AF 08. The Employer did not attach any documentation to her rebuttal or offer answers to any of the questions posed by the NOF.

Final Determination. On August 18, 1995, the CO denied certification on grounds that the Employer failed to prove that the position at issue constituted full time employment. The CO summarized the issues in the NOF and Employer's rebuttal, and explained why the rebuttal was inadequate. Finding that Employer had failed to establish that she was offering a bona fide, full time position for a domestic cook, the CO denied certification because the evidence of record failed to establish that a bona fide job opportunity exists.⁶

Employer's appeal. Following its appeal of September 8, 1995, Employer filed a brief on March 20, 1996, which reiterated its contention that the inquiry as to whether or not the position of domestic cook is a full time position was "not a proper inquiry," contending that, "The only thing that is relevant is this case, is that the Employer has followed normal USDL procedures ... in making the job offer available to U. S. workers who are qualified."

DISCUSSION

Under 20 CFR § 656.3, "Employment" means permanent full time work by an employee for an employer other than oneself. On this basis it is found that the CO's request for specific information regarding the Employer's job opening was reasonable and the CO may require proof that a position for household cooks is confined to cooking on a full time basis. **Dr. Daryao S. Khatri**, 94 INA 016 (Mar. 31, 1995). In this case, the Employer declined to prove that she previously employed a household cook or any other facts

⁶The CO found that, although the information requested in the NOF was readily available to the Employer and was clearly needed to determine whether the position offered was, in fact, full time, Employer declined to provide the requisite evidence.

supporting her burden of proof that she is offering a position of permanent, full time employment.

As the employer bears the burden of proving that a position is permanent and full time, certification may be denied, if the employer's own evidence is not sufficient. It follows that the undocumented statements of the Employer are not compelling evidence of entitlement to certification. **Gerata Systems America, Inc.**, 88 INA 344 (Dec. 16, 1988). In the absence of supporting persuasive evidence the CO did not find that the Employer's rebuttal established the full time nature of this position.

The matter was determined by the CO on the basis of the Employer's refusal to file evidence reasonably requested to answer questions that were germane to a grant of Certification for the reasons that the CO explained in detail. It follows that the CO's conclusion was supported by the evidence of record and should be affirmed, and the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

Sheila Smith, Legal Technician

BALCA VOTE SHEET

Case No: 96 INA 166

MARY ANN MOORE, Employer,
MARIA A. TORRES, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:
	:	CONCUR	DISSENT	COMMENT
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Holmes	:	:	:	:
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Huddleston	:	:	:	:
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Thank you,

Judge Neusner

Date: September 29, 1997